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STUART TAYLOR JR.: COMMENTARY

## How Ricci Almost Disappeared

*Updated at 6:30 p.m.*

For all the publicity about the Supreme Court's 5-4 reversal of Judge **Sonia Sotomayor's** decision (with two colleagues) to reject a discrimination suit by a group of firefighters against New Haven, Conn., one curious aspect of the case has been largely overlooked.

That is the likelihood that but for a chance discovery by a fourth member of the 2nd Circuit Court of Appeals, the now-triumphant 18 firefighters (17 white and one Hispanic) might well have seen their case, *Ricci v. DeStefano*, disappear into obscurity, with no triumph, no national publicity and no Supreme Court review.

The reason is that by electing on Feb. 15, 2008, to dispose of the case by a cursory, unsigned summary order, Judges Sotomayor, **Rosemary Pooler** and **Robert Sack** avoided circulating the decision in a way likely to bring it to the attention of other 2nd Circuit judges, including the six who later voted to rehear the case.

And if the *Ricci* case -- which ended up producing one of the Supreme Court's most important race decisions in many years -- had not come to the attention of those six judges, it would have been an unlikely candidate for Supreme Court review. The justices almost never review summary orders, which represent the unanimous judgment of three appellate judges that the case in question presents no important issues.

The 2nd Circuit and other appeals courts hear cases in three-judge panels, which almost always write full opinions in all significant cases. Those opinions, which are binding precedents, are routinely circulated to all other judges on the circuit, in part so that they can decide whether to request what is called a rehearing *en banc* by the entire appeals court.

Not so summary orders. They do not become binding precedents, and in the 2nd Circuit they are not routinely circulated to the judges except in regular e-mails containing only case names and docket numbers. Those e-mails routinely go unread, on the assumption that all significant cases are disposed of by full opinions, according to people familiar with 2nd Circuit practice.

In any event, any 2nd Circuit judge who had chanced to find and read the panel's summary order in *Ricci* would have found only the vaguest indication what the case was about.

But the case came to the attention of one judge, **Jose Cabranes**, anyway, through a report in the *New Haven Register*. It quoted a complaint by **Karen Lee Torre**, the firefighters' lawyer, that she had expected "a reasoned legal opinion, instead of an unpublished summary order, 'on what I saw as the most significant race case to come before the Circuit Court in 20 years.'"

According to 2nd Circuit sources, Cabranes, who lives in New Haven, saw the article and looked up the briefs and the earlier ruling against the firefighters by federal district judge **Janet Arterton**. He decided that this was a very important case indeed, and made a rare request for the full 2nd Circuit to hold an *en banc* rehearing.

(In response to an e-mail from me, Cabranes declined to comment.)

Cabranes, like Sotomayor a Clinton appointee of Puerto Rican heritage -- and once a mentor to her -- was outvoted by 7-6, with the more liberal judges (including Sotomayor) in the majority. But by publishing a blistering June 12, 2008, dissent Cabranes brought the case forcefully to the attention of the Supreme Court.

By that time, Torre had filed a petition for certiorari with the court, a fairly unusual move in a case involving impecunious clients because of the long odds against success. Those odds seemed especially long in this case. Not only had the panel branded it as insignificant, but the justices usually review cases to resolve conflicts among precedents set by different appeals courts -- and a summary order sets no precedent.

Enter Judge Cabranes. In his dissent, he accused the Sotomayor panel of having "failed to grapple with the questions of exceptional importance raised in this appeal," and he urged the Supreme Court to do so. He stressed that despite the unusually long and detailed briefs, arguments and factual record, the panel's "perfunctory disposition" oddly contained "no reference whatsoever to the constitutional claims at the core of this case." Cabranes also suggested that the case might involve "an unconstitutional racial quota or set-aside."

Some of the seven judges who voted to deny rehearing, including Sotomayor, responded that (among other things) the panel's decision had been dictated by past 2nd Circuit precedents. Cabranes disputed this.

There has been much speculation about what **Adam Liptak** of the *New York Times* described on May 26 as the Sotomayor panel's "remarkably cursory" and "baffling" treatment of the case, which Liptak said "bristles with interesting and important legal questions about how the government may take account of race in employment."

Liptak later reported that "according to court personnel familiar with some of the internal discussions of the case, the three judges had difficulty finding consensus, with Judge Sack the most reluctant to join a decision affirming the district court. Judge Pooler, as the presiding judge, took the leading role in fashioning the compromise. The use of a summary order, which ordinarily cannot be cited as precedent, was part of that compromise."

But if that's what happened, it might be difficult to square the panel's action with the 2nd Circuit's Local Rule 32.1(a). That rule provides that panels may rule "by summary order instead of by opinion" *only* "in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by an opinion (i.e., a ruling having precedential effect)."

In response to e-mails from me asking each of the three panel members why they had proceeded by summary order, Chief Judge **Dennis Jacobs** of the 2nd Circuit called and explained that the judges don't comment on case deliberations except in their published opinions.

Whether that will be Judge Sotomayor's answer when she is asked about the *Ricci* summary order in next week's Senate Judiciary Committee hearing remains to be seen.

*CORRECTION: The initial version of this post erred in stating that the cost of printing the required number of copies of a petition for certiorari is typically "\$20,000-plus." In fact, the cost is typically \$1,000-\$2,000, although it was much more in the firefighters' case because they included voluminous materials from the record in the appendix to their petition.*

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STUART TAYLOR JR.: COMMENTARY

## Justices Reject Sotomayor Position 9-0 -- But Bigger Battles Loom

The Supreme Court's predictable 5-4 vote to reverse the decision by Judge **Sonia Sotomayor** and two federal appeals court colleagues against 17 white (and one Hispanic) plaintiffs in the now-famous New Haven, Conn., firefighters decision does not by itself prove that the Sotomayor position was unreasonable.

After all, it was hardly to be expected that the five more conservative justices -- who held that the city had violated the 1964 Civil Rights Act by refusing to promote the firefighters with the highest scores on a job-related promotional exam because none were black -- would endorse an Obama nominee's ruling to the contrary.

What's more striking is that the court was unanimous in rejecting the Sotomayor panel's specific holding. Her holding was that New Haven's decision to spurn the test results must be upheld based *solely* on the fact that highly disproportionate numbers of blacks had done badly on the exam and might *file* a "disparate-impact" lawsuit -- regardless of whether the exam was valid or the lawsuit could succeed.

This position is so hard to defend, in my view, that I hazarded a prediction in my June 13 column: "Whichever way the Supreme Court rules in the case later this month, I will be surprised if a single justice explicitly approves the specific, quota-friendly logic of the Sotomayor-endorsed... opinion" by U.S. District Judge **Janet Arterton**.

Unlike some of my predictions, this one proved out. In fact, even Justice **Ruth Bader Ginsburg's** 39-page dissent for the four more liberal justices quietly but unmistakably *rejected* the Sotomayor-endorsed position that disparate racial results alone justified New Haven's decision to dump the promotional exam without even inquiring into whether it was fair and job-related.

Justice Ginsburg also suggested clearly -- as did the Obama Justice Department, in a friend-of-the-court brief -- that the Sotomayor panel erred in upholding summary judgment for the city. Ginsburg said that the lower courts should have ordered a jury trial to weigh the evidence that the city's claimed motive -- fear of losing a disparate impact suit by low-scoring black firefighters if it proceeded with the promotions -- was a pretext. The jury's job would have been to consider evidence that the city's main motive had been to placate black political leaders who were part of Mayor **John DeStefano's** political base.

Disparate-impact law, as codified by Congress in 1991, specifies that an employer whose qualifying exam or other selection criterion produces racially disparate results can be held liable for unintentional discrimination *only* if (1) the test is not "job-related... and consistent with business necessity," or (2) the employer is presented with and refuses to adopt another, similarly job-related test with less disparate impact.

Contrary to the Sotomayor-endorsed opinion, the Ginsburg dissent states (on page 19) that an employer's decision to jettison a promotional test under circumstances like this case would be legal *only* if the employer had "good cause to believe the [test] would not withstand examination for business necessity."

Ginsburg added (on page 26 and page 33) that "ordinarily, a remand for fresh consideration" would be proper because the lower courts (including Judge Sotomayor) had not carefully considered the evidence of "pretext" and racial politics.

To be sure, Justice Ginsburg also found (against the clear weight of the evidence, in my view) that New Haven *did* have good cause to believe that the test was invalid. She also said that if either party was to be granted summary judgment, it should have been the city, and that the Supreme Court majority had erred in awarding summary judgment to the high-scoring plaintiffs.

But as a matter of law, the difference between the Sotomayor position and the Supreme Court dissenters' position is nonetheless important and revealing.

Both, in my view, would risk converting disparate-impact law into an engine of overt discrimination against high-scoring groups across the country and allow racial politics and racial quotas to masquerade as voluntary compliance with the law.

But while Ginsburg at least required the city to produce some evidence that the test was invalid, the Sotomayor panel required no such evidence at all. Its logic would thus provide irresistible incentives for employers to abandon any and all tests on which disproportionate numbers of protected minorities have low scores.

And racially disparate scores on virtually all objective tests are unfortunately the norm, not the exception. It's not hard to understand why: Studies have long showed that because of unequal educational opportunities and cultural differences, the average black high-school senior has learned no more than the average white eighth-grader -- and considerably less than the average white senior.

Of course, this would be no justification for basing promotions on test scores that have little relationship to the requirements of the job. But the New Haven exam was clearly job-related and carefully developed to insure race-neutrality, as the majority opinion of Justice **Anthony Kennedy** detailed.

To be sure, as Ginsburg argued, alleged imperfections in the New Haven test were attacked by black firefighters, city officials, and others after the fact. But every written and oral objective test ever devised can be similarly attacked as imperfect. If the law were as Judge Sotomayor ruled, no employer could ever safely proceed with promotions based on any test on which minorities fared badly.

The broader questions lying behind the New Haven case are whether this nation will ever get beyond racial preferences and quotas such as those encouraged by both the Sotomayor and the Ginsburg positions, and whether it will ever realize Dr. **Martin Luther King's** dream of a nation where people are judged not by the color of their skins, but by the content of their characters.

Justice Ginsburg's prediction that the New Haven decision "will not have staying power" seems to reflect a conviction that the nondiscrimination ideal articulated by Dr. King should be put on hold for the indefinite future, if not forever. Judge Sotomayor's position in the case, and some of her off-the-bench pronouncements, suggest the same even more strongly.

**President Obama's** campaign rhetoric about getting away from identity politics and racial spoils seemed to promise something rather different.